

COUNTY COLLECTORS: County Collectors liable on official bonds, where they fail or refuse to publish a list of delinquent lands for sale.

August 13, 1937

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri



ATTENTION: W. A. Holloway, Chief Clerk

Dear Sir:

This is to acknowledge receipt of your request for an opinion, reading as follows:

"We would like for your office to advise us concerning the liability of a county collector and his bondsmen should the county collector fail or refuse to make the required publication and hold the certificate sale for the collection of taxes as prescribed by the Jones-Munger back tax law; and by that failure or refusal to hold such sale permit taxes due to outlaw under the statute of limitations.

"Concerning this publication, it has been the understanding of this office that under the provisions of Section 9952b as amended by the 58th General Assembly, Laws of Missouri 1935, page 403, that the costs of the afore mentioned publication should be paid out of

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the county treasury, and that said costs of publication should be taxes as costs in the certificate sale and paid by the certificate purchaser, thereby reimbursing the county treasury.

"We would like for you to advise us if this interpretation is correct."

Your attention is respectfully directed to Section 9885, relating to the requirements of every collector of revenue in the various counties of this state, in giving bond, Laws of Missouri, 1935, p. 409. It reads in part as follows:

" \* \* \* conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law."

From the above quotation you will particularly notice the phrases "faithfully and punctually collect" and "faithfully perform \* \* \* according to law". We shall consider these phrases and words in light of adjudicated cases and standard definitions of the same.

In this connection your attention is directed to the case of Perry v. Thompson, 16 N. J. (Law) 72, 73, wherein the court in speaking of the word "faithfully", said:

"The word 'faithfully', as it respects temporal affairs, means diligent, without unnecessary delay: as a faithful officer, a faithful servant, in applying to their duties".

In the case of Archer v. Noble 3 Me., 418, 420, the court had before it for consideration the construction of a bond that had been given by a constable in office wherein the bond was conditioned by the faithful performance of the duties of that office, and in construing the bond the court said:

"Now, as Noble, constable, and his surities, were bound for his faithful performance of the duties of his office, the condition of the bond must be construed to embrace all those instances of malfeasance, misfeasance, and nonfeasance, in the execution of his office, which would subject a principal to responsibility for similar wrongful actions of his deputy; and we have seen how far this responsibility extends."

A diligent search has not disclosed wherein a judicial interpretation has been placed upon the word "punctually", and we have relied upon the definition ascribed to the word by Webster's New International Dictionary. It is defined as follows:

" \* \* \* promptly \* \* \* "

The word "punctual", an adjective, is defined by the afore mentioned dictionary as follows:

"Punctilious in regard to appointed time; of action; manifesting attentiveness to exact time determined by an engagement or schedule."

In the case of Shanahan v. State, reported in 142 Md. 616, 630, 631, 635, the court considered the

liability of one William J. Shanahan, on his bond executed in the favor of the State of Maryland. The conditions of the bond were substantially the same as the conditions imposed by Section 9885, supra. The court in speaking of the duties imposed upon the collectors of public moneys said:

"There are many cases, both in this state and elsewhere, which prescribe with more or less clearness the duties of such an official as a county treasurer, but nowhere is it more clearly defined than in the case of United States v. Thomas, 15 Wall, 337, which opinion was written by Justice Bradley, and in it he lays down the rule that 'a collector of public moneys is a bailee and only bound to due diligence and only liable for negligence or dishonesty. \* \* \* The measure of his accountability is to be found in the official bond.' This decision is in accord with Colerain v. Bell, 9 Metc. (Mass.) 499. In Olean v. King, 116 N. Y. 355, the collector and his bond were held liable because of the fact that he rendered no account whatever of uncollected taxes, and the case of Supervisors v. Otis, 62 N. Y. 88, follows the same rule as did Justice Bradley in United States v. Thomas, supra.

\* \* \* \* \*

" \* \* \* a collector may be liable for taxes which he never collects, where the

failure to collect was due to some omission or act of negligence upon his part."

The evidence in this case tended to show that the defendant was derelict in his duty for failure to make a return of defunct corporations, chattels no longer in existence, property in custodia legis; and, further, that in the case of property in custodia legis, the collector made no application to the court under the jurisdiction of which the property was for an order for leave to sell, which would have given him a priority for taxes.

The court, in speaking further of the duties imposed upon the collector, at page 635, said:

"It is perfectly manifest that, after Mr. Shanahan ceased to be the county treasurer, he had no means at his command by which to enforce the payment of taxes due for the years when he had been county treasurer which he had not collected, but this cannot be carried to the point of saying that he and his bond were relieved of all liability for the non-collection of taxes when that was the result of some dereliction upon his part."

From the above considerations you will have noticed: that when a collector of public moneys is charged with the duty of faithfully and punctually effecting the collection of moneys due the sovereign, and fails, it amounts to non-feasance in office, and such dereliction while in office may make the collector and his sureties liable upon his therefore executed bond.

We next turn in our consideration to the duties imposed upon the various collectors of this state relat-

ing to the publishing and printing of lists of the delinquent lands and lots to be sold on the first Monday in November of each year.

Under the provisions of Section 9949 Laws of Mo., 1933, p. 427, it is provided in substance and effect that the collectors of the respective counties of this state shall proceed to collect the taxes contained in the back tax book or recorded list of delinquent lands and lots in the collector's office.

Section 9952a, Laws of Mo., 1933, p. 430 provides in substance and effect that all lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes.

Section 9952b, Laws of Mo., 1935, p. 403, 404, provides in part as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November."

In the case of *ex parte Brown*, 297 S. W., 445, 447, the court in discussing whether a statute was mandatory or directory, said:

"When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the

validity of the act or proceeding, then such statute is mandatory."

In the case of State ex rel Stephens v. Wurdeman, 295 Mo. 586, the court said:

"Usually the word 'shall' indicates a mandate and unless there are other things in the statute it indicates a mandatory statute."

The general proposition of law relating to the condition of an official bond is found in 46 C. J., 1068, paragraph 398. It reads as follows:

"The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

In the case of People v. Smith, 55 Pac. 765, 1. c. 766, the court said:

" \* \* \* the duty of the assessor to collect the tax is merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In People v. Gardner, 55 Cal. 304, 307, it was said: 'It is the duty of an officer to do what the law requires to be done in his office, for

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the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by anyone in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a nonperformance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable \* \* \*."

Your attention is further directed to Section 9952b, Laws of Mo., 1935, p. 403. It reads in part as follows:

"The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taken as part of the costs of the sale of any land or lot contained in such list."

Construction of the above part of the statute is unnecessary where words as used are plain and without ambiguity. Thus it follows the expense of printing the list of delinquent lands and lots shall be paid by the county and taxed as part of the cost of the sale to be paid by the purchaser of such lands and lots. And by this means the county treasury is reimbursed.

In view of the above, it is the opinion of this department that if a collector, due to his own fault or neglect, fails or refuses to make the requir-

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ed publication, and conduct the sale for the collection of delinquent taxes, as prescribed by the Jones-Munger Act, and thereby causing and permitting the statute of limitation to run, such collector or collectors are liable on their official bonds.

Very truly yours,

RUSSELL C. STONE  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

RCS:JMW